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In The
Supreme Court of The United States
October Term 1994

KATHRYN THOMPSON REMMEY and ERNEST M. REMMEY, Executors of the Estate of LOUISE REMMEY, Deceased,
Petitioners,

v.

PAINEWEBBER INCORPORATED and ARNOLD MARKS,
Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

I. Whether concealment from the parties of an arbitrator's history of securities ethics violations is grounds for vacatur of an arbitration decision under 9 U.S.C. § 10(a).

II. Whether a party to a federal arbitration has the burden of doing his own independent investigation of the arbitrators, and may not rely on the accuracy and completeness of the information on the arbitrators furnished by the arbitrators and the self-regulatory organization (SRO) conducting the arbitration.

III. Whether an SRO, in appointing arbitrators, may ignore regulations mandated by the Securities Exchange Commission (SEC), set forth in the SRO's rules. See Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 232 (1987).

approving arbitration in securities disputes only because of the SEC regulatory power.

IV Whether a party to a federal arbitration who shows that relevant and material information about the arbitrators was not provided is entitled to have the arbitration vacated under 9 U.S.C. § 10(a). The Fourth Circuit holding that petitioner is not so entitled is contrary to Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968) and decisions from the 2d, 6th, 7th, 9th and 11th Circuits. See also Affiliated Ute Citizens v. United States, 406 U.S. 128, 154 (1972).

LIST OF PARTIES

The only parties to this proceeding are named in the caption.

This matter commenced as an action brought in 1990 by Mrs. Louise Remmey through her attorney-in-fact, Mrs. Kaye Grove, seeking recovery against an individual stockbroker, Arnold Marks, and his employer, PaineWebber, Incorporated.

Following Mrs. Remmey's death on March 20, 1993, the executors of her estate, Kathryn Thompson Remmey and Ernest M. Remmey, were substituted as plaintiffs by Motion to the United States District Court for the Middle District of North Carolina.

For ease of reference within this Petition, PaineWebber, Incorporated will be referred to as PW and Arnold Marks will be referred to as Marks. Petitioners will be referred to collectively or as Remmey or Mrs. Remmey.

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OFFICIAL AND UNOFFICIAL OPINIONS INVOLVED IN THIS CASE

Citations herein to the appendix are as A 50.

The arbitration decision was rendered January 17, 1992. (A 56). Petitioners' Motion to Vacate the arbitration decision was denied by the U. S. District Court for the Middle District of North Carolina on December 14, 1992, by Memorandum Opinion and Final Judgment. (A 31, 42). Petitioners' motions under Federal Rules 52(b) and 60 were denied July 15, 1993. (A 54). Pursuant to Appellate Rules 3 and 4, notice of appeal as of right was given on August 13, 1993.

The U. S. Court of Appeals for the Fourth Circuit affirmed the District Court decision on August 19, 1994. 32 F.3d 143 (4th Cir. 1994). (A 1). A Petition for Rehearing with Suggestion for Rehearing en

banc was denied on September 13, 1994. (A 62).

JURISDICTIONAL STATEMENT

The date of entry of the judgment of the Fourth Circuit sought to be reviewed is August 19, 1994. This Petition for Writ of Certiorari is based on 28 U.S.C. § 1254(1).

PERTINENT STATUTES AND REGULATIONS

The texts of pertinent law are in the Appendix hereto: U. S. CONST., amend. V (A 64); 9 U.S.C. § 10(a)(1)-(4) (A 64); NASD Code of Arbitration Procedure §§ 19, 21, 22, 23 (A 65-72); NASD Rules of Fair Practice, Article III, §§ 1, 2 (A 72); and NASD Rules of Fair Practice, Append. F, § 3 (A 73).

STATEMENT OF THE CASE

In December 1985, Louise Remmey, then 80 and suffering from congestive heart failure, entrusted her securities to Marks, a broker employed by PW, pursuant to a

Resource Management Account (RMA). Mrs. Remmey suffered a stroke in February 1986. By September 1989, Marks had shifted Mrs. Remmey's portfolio from suitable investments, consisting of 91.4% bonds and debt instruments, to investments highly unsuitable. Marks admitted recommending every trade in the Remmey account and under Fourth Circuit precedent Marks is deemed in control of the account. See, e.g., Carras v. Burns, 516 F.2d 251, 258 (4th Cir. 1975). Pursuant to Marks' recommendations 65.4% of Mrs. Remmey's assets, or $443,000, was shifted to real estate limited partnerships and 18.52% was moved to proprietary and closed end mutual funds. All these investments carried very high brokerage commissions upon purchase. The partnerships were not generally marketable, so their values at any time are not readily ascertainable. But leaving aside other

losses arising from PW's and Marks' trading of the Remmey account, by the time of the arbitration hearings the ten real estate limited partnerships sold by PW through Marks had lost between $153,936 (PW employee's testimony) and $366,960 (petitioners' expert testimony) from the total purchase prices thereof. In September 1989 Marks changed his employment from PW to Prudential Bache, taking the Remmey account with him. Members of Mrs. Remmey's family then learned of the types of investments which had been made in the account and removed the account from Marks' control shortly thereafter.

Suit was filed against Marks and PW in October 1990 on behalf of Mrs. Remmey, then totally incompetent, by Mrs. Kaye Grove, her attorney-in-fact, seeking damages under the federal securities laws and pendent state claims for fraud and breach of

fiduciary duty. PW referred to a mandatory arbitration clause in fine print in its RMA account document, and the matter was referred by the parties to arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1-16, and the rules of the National Association of Securities Dealers (NASD).

Sections 19(b) and (d) of the NASD Code of Arbitration Procedure (NASD Code) provide that in arbitration matters involving public customers in sums exceeding $30,000 a majority of the arbitrators shall not be from the securities industry and shall be deemed "public" arbitrators. (A 65-67). Section 22 of NASD Code also provides that each party shall have one peremptory challenge to the arbitrators appointed by the NASD. (A 69). NASD appointed Marshall H. Johnson, a Greensboro stockbroker, as the industry arbitrator, and H. Victor

Schwimmer and Stanley V. Lewis as public arbitrators. Repeated requests by petitioners' counsel in letters of August 7, 21, and 27, 1991 (A 76-82), for copies of the sworn application questionnaires (termed "Arbitrator Profiles" by NASD), by which the persons appointed as arbitrators sought appointments to the NASD pool of arbitrators, elicited no response from the NASD Director of Arbitration. Petitioners' requests were authorized by NASD Code § 21 (A 67-69) which states that "[a] party may make further inquiry of the Director of Arbitration concerning an arbitrator's background," in addition to names and employment histories spanning ten years, and NASD Code § 23 disclosures. (A 67-68).

Testimony before the arbitration panel centered around PW's and Marks' violations of NASD Rules of Fair Practice involving unsuitable investments, churning, and lack

of broker supervision. The arbitration panel dismissed all of Mrs. Remmey's claims and set arbitrators' fees totaling $10,000 equally between Mrs. Remmey and PW.

Counsel for Mrs. Remmey filed a motion to vacate the arbitration decision in the District Court. Petitioners' counsel issued subpoenas to NASD for the sworn arbitrator profile questionnaires and all other information available to NASD about the persons appointed as arbitrators. As a result NASD agreed to furnish by affidavit significant additional information about the arbitrators. A description of some of this information follows.

A. Post-Award Information About The Industry Arbitrator

The NASD produced incontrovertible evidence that arbitrator Johnson had himself been found guilty of six violations of the NASD Rules of Fair Practice, with

similarities to those at issue in this case, and that he had submitted a sworn false arbitrator profile questionnaire on February 13, 1989, which covered up these ethical violations.

The arbitrator profile, signed and submitted by Johnson seeking appointments as an NASD arbitrator, asked whether "any self-regulatory organization" had found him to be "involved in a violation of its rules." Johnson answered this question with a mark in the "no" column and offered no explanation with, or for, this answer, although ample space for comments was provided. The answer was false. The NASD District Business Conduct Committee had, on two separate previous occasions, found Johnson guilty of six distinct violations of Article III, Section 1 of the NASD Rules of Fair Practice, requiring "high standards of commercial honor and just and equitable

principles of trade." (A 72-3). In addition, Johnson had been found guilty of two other rule infractions, making a total of eight infractions which he should have reported in answer to the above question. Fines were assessed against Johnson and his brokerage firm in amounts of $1,000 in June 1980 and $500 in December 1978 for some of the violations.

Mrs. Remmey's claims against Marks and PW were of a nature similar to those involved in the NASD proceedings against Johnson. For example, Johnson was found, on a number of public issue prospectuses, to have placed a label with the address and phone number of his firm over the names of managing underwriters, obviously misleading to customers as to the identity of the underwriters of the securities. Misrepresentation as to suitability and character of the investments sold to Mrs.

Remmey were issues in this case. Similarly, Johnson was found guilty of failing properly to supervise individual brokers working for his firm, paralleling an issue here as to PW's supervision of Marks.

B. Lack of Required Qualification Ascertainment for The "Public" Arbitrators, Revealed Post-Award

With regard to Schwimmer and Lewis the subpoenaed information from NASD disclosed that NASD did not have any sworn arbitrator profile questionnaire for Schwimmer. There was nothing in NASD's files at all to qualify this panelist as a public arbitrator. With regard to Lewis there was on file an arbitrator profile questionnaire dated July 31, 1989, but it in no way qualified under NASD's own rules as a determination whether Lewis met the requirements of public arbitrator specified

by NASD Code §§ 19(c) and (d), as amended. (A 66-67).

On March 26, 1990, the NASD Director of Arbitration had sent a Memorandum entitled Arbitrator Profile Update to all persons on NASD's list of arbitrators. The Memorandum is in the Appendix. (A 82). The Memorandum noted the critical importance of arbitrator classification, referring to Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987). The Memorandum stated that Shearson/Am. Express expressed the belief that an arbitration forum provides a "fair, just and prompt resolution of securities disputes," but also noted skepticism regarding fairness, from both this Court and the Securities Exchange Commission (SEC), that "individuals with industry ties [were being] classified as public arbitrators." (Emphasis supplied). (A 83). The

Memorandum stated, "This skepticism was detailed by the SEC in a letter to the NASD and other self-regulatory organizations recommending certain categories to be excluded from the pool of public arbitrators." (A 83-4). The Memorandum announced that NASD had amended its Code of Arbitration Procedure on May 10, 1989, in response to the SEC letter, to exclude from serving as public arbitrators any "professional who has devoted twenty (20) percent or more of his or her professional work effort to securities industry clients within the last two years . . . ." (A 84-5). See NASD Code § 19(c)(5). (A 67).

The March 26, 1990 Memorandum directed each recipient to complete an updating "arbitrator questionnaire" for the purpose of enabling the NASD to classify arbitrators as "securities or public arbitrators in accordance with the

provisions of the new rules," and stated that a number of individuals who were then serving as public arbitrators would "be reclassified as securities arbitrators or be removed from the national pool." (A 86). The Memorandum stated that NASD's arbitrator data base for classification of arbitrators required additional information about the arbitrators. (A 86).

Among other subjects, the updating questionnaire asked whether the arbitrator had "been an expert for a broker/dealer in an action or in support of a claim against a broker/dealer over the past two years."

Neither Lewis nor Schwimmer ever returned the March 26, 1990 questionnaire. Lewis had sworn to an earlier profile, and was approved as an arbitrator by NASD on July 31, 1989, but NASD would not provide the earlier sworn profile for petitioners prior to the arbitration. But the subpoena

also brought forth, with Lewis' 1989 sworn profile, a related document entitled "Curriculum Vitae," and labeled "Input 8/29/91," which date was just twelve days before the arbitration was to begin. This document, in the Appendix at p. 87, detailed consistent involvement by Lewis on securities industry boards, panels, and committees, and as an arbitrator and expert witness in securities matters. This information, which raised serious questions about Lewis' qualifications as a public arbitrator pursuant to the guidelines of NASD Code § 19(c), was never provided petitioners before the arbitration. Essentially, the only information about Lewis provided to petitioners was that outlined in the Fourth Circuit opinion, i.e., that Lewis had retired in 1989 as Deputy Securities Commissioner in South Carolina, had before that been a securities

examiner for the State, and had been a stockbroker for five years prior to 1970. (A 12).

The subpoenaed documents presented to the District Court and to the Court of Appeals thus demonstrated that none of the arbitrators appointed in this case were qualified to serve and their appointment by NASD deprived petitioner of due process of law under the Fifth Amendment to the Constitution of the United States, unless the arbitration is vacated, as it should be, pursuant to 9 U.S.C. § 10(a)(1) because corrupt, fraudulent, or brought about through undue means, or partiality or arbitrator misconduct pursuant to 9 U.S.C. §§ 10(a)(2) and (3). (A 64-65).

BASIS FOR FEDERAL JURISDICTION

This action sought recovery under the anti-fraud provisions of the securities laws of the United States, 15 U.S.C. §

78j(b). Arbitration was pursuant to 9 U.S.C. §§ 1-16.

The United States Fourth Circuit had appellate jurisdiction pursuant to 28 U.S.C. § 1291. The actions below deprived petitioners of due process under the United States Constitution, Amendment V.

ARGUMENT

A. Introduction

This petition for writ of certiorari should be granted, pursuant to Supreme Court Rule 10, because the Fourth Circuit opinion conflicts with mandates of this Court requiring supervision "sufficient to ensure that arbitrators comply with the requirements of the statute." Shearson/Am. Express, 482 U.S. at 232. The Fourth Circuit decision allows the NASD to flaunt SEC regulations, despite that the availability of oversight by SEC was the basis on which this Court approved

arbitration in securities cases. Id. It is in conflict with the substantive law in this Court's opinions of Commonwealth Coatings Corp. v. Continental Cas. Co., 393 U.S. 145 (1968) and Affiliated Ute Citizens v. United States, 406 U.S. 128, 154 (1972).

It further conflicts with federal circuit and district court decisions such as Middlesex Mut. Ins. Co. v. Levine, 675 F.2d 1197 (11th Cir. 1982); Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1358-59 (6th Cir. 1989), cert. denied, 493 U.S. 809 (1989); and Rogers, Att'y Gen. v. Schering Corp., 165 F. Supp. 295 (D.N.J. 1958), mot. denied 262 F.2d 180 (3d Cir. 1959), aff'd 271 F.2d 266 (3d Cir. 1959), cert. denied 359 U.S. 991 (1959).

This petition should also be granted for this Court to address the question whether an arbitrator's history of ethics violation convictions must be disclosed to

arbitration participants so that failure to disclose is grounds for vacatur.

Furthermore, this Court should address a split in circuit decisions, wherein the Fourth Circuit appears to hold an arbitration participant to a standard of proof of harm from bias, as a ground for vacatur, while other circuits have adopted the standard that a "reasonable impression of bias" is sufficient. The "reasonable impression" standard is discussed in Apperson, 879 F.2d at 1358, which notes similarity among other circuits: the Second (Morelite Const. Corp. v. New York City District Council Carpenters Benefit Fund, 748 F.2d 79 (1984)), the Seventh (Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 681-82, cert. denied, 464 U.S. 1009 (1983)), and the Ninth (Toyota of Berkeley v. Automobile Salesmen's Union, Local 1095, 834 F.2d 751, 755-56, cert. denied 486 U.S.

1043 (1988) and Sheet Metal Workers Int'l Ass'n Local 420 v. Kinney Air Conditioning, 756 F.2d 742, 745-46 (1985)).

B. The "Industry" Arbitrator

The Fourth Circuit has condoned concealment by an arbitrator and NASD of the arbitrator's past ethical violations. This holding threatens the underpinnings of the arbitration system and must be corrected. That the information about Johnson was material as to his pre-existing bias or partiality cannot be gainsaid. See 9 U.S.C. § 10(a)(2). (A 64-65). Any trial lawyer would use a peremptory challenge on a prospective juror who had been found guilty of an offense the same or similar to the matter before the court. A taint sufficient to subject a juror to challenge was a test of materiality articulated for arbitration proceedings in Commonwealth,

393 U.S. at 148. Obviously the information about Johnson's rule violations was material. Otherwise, why did the NASD questionnaire ask about them? The Court of Appeals recognized the materiality of the information. It said in dicta:

> Regardless of whether NASD rules strictly require disclosure of an arbitrator's past NASD disciplinary infractions, it seems apparent that public confidence in the NASD arbitration process would be enhanced if such information were not only available to the parties, but was in fact actually conveyed to them. (A 15, fn. 4).

The Court of Appeals sought to justify limiting this ruling to dicta by holding that petitioner "has not shown that these [ethical] infractions affected Johnson's impartiality, thereby yielding an impermissible award." (A 16). This holding ignores the long established precedent in this Court that if material facts are withheld or concealed, reliance

thereon and causation of harm by such concealment are presumed. "This obligation to disclose and this withholding of material facts established the requisite element of causation in fact." Affiliated Ute Citizens, 406 U.S. at 154. Compare also this Court's holding in Commonwealth, where the petitioner apparently even conceded there was no actual bias. 393 U.S. at 147. Nevertheless, the award in Commonwealth was "set aside on the basis of 'evident partiality' or the use of 'undue means'" because of nondisclosure to the petitioner of "dealings that might create an impression of possible bias." 393 at 148-149. The circumstances regarding Johnson also clearly meet the "reasonable impression of partiality" standard discussed in Apperson, 879 at 1358 (adopted in the 2d, 6th, 7th and 9th Circuits).

The Fourth Circuit also holds that petitioners should have raised the objection relating to Johnson's ethical violations before the arbitration (A 17), disregarding the crux of the problem in this case, which is the nondisclosure to petitioner. This Fourth Circuit holding is based upon the fact that, after the arbitration was completed, petitioners' counsel was alerted to Johnson's ethical violations, not as he should have been by the Director of Arbitration, but by inquiry pursuant to the NASD's Public Disclosure Program. This holding, if allowed to stand, means that a party may not now rely upon the integrity of information about an arbitrator furnished by the NASD, but must do his own time-consuming and expensive separate background check on the arbitrators. NASD's Public Disclosure Program is unrelated to NASD Arbitration

and is for the entirely different purpose of providing information to the general public "which will help them in their determination whether to conduct or continue to conduct business with an NASD member . . . ." (A 90). That program is not intended for, and generally is not even known by, persons in an arbitration under the NASD Department of Arbitration, which has its own established procedures for providing information regarding arbitrators. See NASD Code §§ 21 and 23 at A 67 and 70. And what about NASD's obligation to provide relevant information, even that which might be in its files in another of its departments? "The law is not tender toward those who fail in their responsibility to exercise the necessary good faith in their dealings with others." Middlesex, 675 F.2d at 1204 (citation omitted). Nor should the law be harsh

toward an innocent party harmed by the failure of another.

The Fourth Circuit holding is totally at odds with governing NASD Code §§ 21 and 23, which place upon both the individual arbitrator and the NASD the burden of disclosing "any circumstances which might preclude such arbitrator from rendering an objective and impartial determination." (NASD Code § 23(a) at A 70). The burden is not upon a party to search behind information provided by the arbitrators and the NASD. This Fourth Circuit ruling guts the concept of arbitration, which is to provide a convenient and less expensive way to resolve disputes. As this Court said in Commonwealth:

> We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias. 393 U.S. at 149.

The Fourth Circuit ruling is in conflict with the Eleventh Circuit which holds:

> The law does not require that [a party to arbitration] ascertain whether an arbitrator has violated his duty of disclosure. Such a procedure would be prohibitively time consuming and costly. It would also frustrate the goal of arbitration which is to expedite the resolution of disputes and to decrease the cost of litigation. Middlesex 675 F.2d at 1203.

The law in the Sixth Circuit is in accord with Middlesex:

> The successful party in the grievance may not rely on the failure to object for bias, however, unless "[a]ll the facts now argued as to [the] alleged bias were known . . . at the time the [arbitration panel] heard their grievances." Apperson, 879 F.2d at 1359 (citations omitted).

Remmey had a right to the information concerning Johnson's ethical violations. With that information she would have had grounds to challenge Johnson for cause or

to use her peremptory challenge. Failure to have that information disclosed to her violated her rights under any concept of due process of law. Compare Rogers, 165 F.Supp. at 300, which (under a different type arbitration procedure) held that a party, who may have a sensitivity to the disclosure not realized by the appointing authority, should not be deprived of at least the opportunity to convince the appointing authority of the desirability of selecting an arbitrator replacement.

This Court has noted the "strict morality and fairness . . . expected on the part of the arbitrator." Commonwealth, 393 U.S. at 148. Here, not only is the fact of the undisclosed infractions important. Equally important as the infractions is the fact that Johnson provided a false answer concealing them. A false answer is much more significant than a "simple failure to

respond." Pierce v. Altman, 147 Ga. App. 22, 248 S.E.2d 34, 36 (1978). The Fourth Circuit is condoning this false answer, in clear violation of petitioners' right to an arbitration untainted by partiality or fraud. See 9 U.S.C. § 10(a)(1), (2), (3).

This Court has held that the arbitration must not only "be unbiased but must avoid even the appearance of bias." Commonwealth, 393 U.S. at 150. The Fourth Circuit intimates that the nondisclosure of a financial interest here might have been grounds for vacatur. (A 16-17). In any rational system of justice, how can a falsification and resulting nondisclosure of ethical violations be any less a ground for vacatur under 9 U.S.C. § 10(a)?

C. The "Public" Arbitrators

The contract to arbitrate in this case required that it be done "in accordance with the rules, then obtaining" of the

NASD. (A 92). Failure to conduct the arbitration in accordance with arbitral rules goes to the integrity of the body designed to resolve the controversy and fails to protect "due arbitration process." Rogers, 165 F. Supp. at 301. See also American Guar. Co. v. Caldwell, 72 F.2d 209, 212 (9th Cir. 1934); Cox v. Cox, 33 N.C. App. 73, 234 S.E.2d 189, 190 (1977). It is an arbitration result obtained by "undue means" within the meaning of 9 U.S.C. 10(a)(1).

Without the return of the sworn arbitrator questionnaires, there was no procedural basis on which NASD could qualify either Schwimmer or Lewis as public arbitrators, and their appointments violated Mrs. Remmey's right to procedural due process.

The Fourth Circuit ignored NASD's violations, stating that petitioners'

counsel had conceded that no NASD rule required return of the questionnaire. Respectfully, counsel conceded only that the published NASD Code of Arbitration Procedure did not, by its terms, refer to or require return of the sworn, updated questionnaires. But that has nothing to do with the fact that when NASD appointed Schwimmer and Lewis as public arbitrators, without sworn substantiation of their qualifications, that organization violated its own internal operating policies, mandated by the SEC, as set forth in NASD's Memorandum of March 26, 1990. NASD's failure to obtain from the arbitrators the questionnaires it required foreclosed any possibility that NASD could classify these panelists as public arbitrators in compliance with its Code of Arbitration Procedure, which was central to the contract with Mrs. Remmey.

The Fourth Circuit's superficial reasoning that Mrs. Remmey must establish that "failure to complete the questionnaire impaired the ability of the arbitrators to render a fair decision" sidesteps the significance of the failure of due process in this case. It is of a piece with the same erroneous reasoning as to arbitrator Johnson, ignoring Affiliated Ute and Commonwealth, supra.

The Court below recited the usual deference to arbitration--that the courts are not to determine whether the arbitrators were right or wrong, but simply whether they carried out an arbitration. (See, e.g., A 8). But if the NASD does not obtain the credentials of its arbitrators, as mandated by the SEC, NASD's operating procedures and any rule of sensible conduct, prior to selecting and appointing arbitrators, and the courts give great

deference in arbitration matters, who is safeguarding the due process rights of the securities consumer?

Certainly, this matter was arbitrated poorly and incorrectly, and the result was outrageous. Even if Mrs. Remmey had been a healthy, fully competent, youthful investor, the sale to her of limited partnerships which used 65% of her assets was in gross violation of provisions relating to investment "suitability" in the ethical rules set out in NASD's Rules of Fair Practice. (See, e.g., Art. III, Sec. 2 and Appendix F, Sec. 3, A 73-5). Also compare this case with, for example, SEC v. Prudential Securities, Inc., 1993 CCH Fed. Sec. L. Rep. Transfer Binder ¶ 97,780, in which Prudential consented to an open-ended settlement of a minimum $330,000,000 in a class action involving

But leaving aside the particular result in this matter, it is surely taking the judicial "hands off" policy too far when arbitrators who were improperly appointed to their positions may render any arbitration decision. It is certainly not established that arbitrators Schwimmer and Lewis were qualified to conduct this arbitration as public arbitrators. Yet the Fourth Circuit elaborated on the "suitable credentials" of these panelists, stating, in part, "There can be little question that Messrs. Schwimmer and Lewis were qualified to address Remmey's claims against Marks and PaineWebber." (A 12-13). It even appeared to wax indignant on Mr. Lewis' behalf, stating that "[w]e have no reason to characterize as an "industry arbitrator" someone whose professional career was largely spent in enforcing state securities laws." (A 14, fn. 3). But that

is not the point. Petitioners are concerned, at a minimum, with whether there was a 20% industry involvement in the last two years violative of NASD Code § 19(c). (A 67).

The fact is that NASD files contained no sworn or properly verified information of any kind on Mr. Schwimmer's qualifications to be an arbitrator. The NASD file on Lewis contained an outdated sworn arbitrator profile and an unsworn document titled "Curriculum Vitae" discussed above, but no response to the March 26, 1990 questionnaire which had as its purpose the determination of the arbitrator's qualifications to be a public arbitrator under the amended NASD Code § 19. These documents, particularly "Curriculum Vitae," which NASD would produce only after the arbitration, pursuant to subpoena, contain information

which raises serious questions whether Lewis could have been classified under the amended Code § 19(c) as a public arbitrator, given his work on boards and panels in the securities industry. At a minimum, this document, had it been timely produced, would have provoked many questions about whether Lewis had acted frequently as an expert witness for securities clients or spent more than 20% of his professional time in the preceding two years for industry clients. To justify an opinion which purports to answer affirmatively that these persons could be classified as public arbitrators, the Fourth Circuit recited nothing but the inadequate information provided petitioners by NASD before the arbitration began. But this information, repeated by the Court, <u>still</u> does not speak to the qualifications of these people as required

by amended NASD Code § 19(c). Information intended to be elicited by the March 1990 questionnaires would have provided the bases for determining qualifications, had the questionnaires been returned. Although the Fourth Circuit presumed to supply the arbitrator qualifications, the NASD never did, and it was certainly NASD's obligation to classify properly these arbitrators in the first instance.

The Fourth Circuit misapprehended the significance of the amended NASD Code and the March 1990 NASD Memorandum and profile questionnaire, which can best be stated by borrowing the words of this Court.

> At issue in this case is the question whether elementary requirements of impartiality taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through arbitration. Commonwealth, 393 U.S. at 145.

Petitioners repeatedly requested the sworn arbitrator questionnaires and other information on the panelists prior to the hearings, in accordance with NASD Code procedures, to no avail. Had NASD done its job, and been forthcoming, the issues raised here would have been resolved prior to the commencement of the arbitration hearings.

Mrs. Remmey's age and condition highlighted the supposed feature of expediency in arbitration. Yet the only way the relevant information could have been obtained prior to arbitration would have been by a time consuming and expensive motion and subpoenas in federal court, which would have been attacked as interlocutory and improper, and certainly would have contradicted the principle that arbitration is supposed to be speedy and

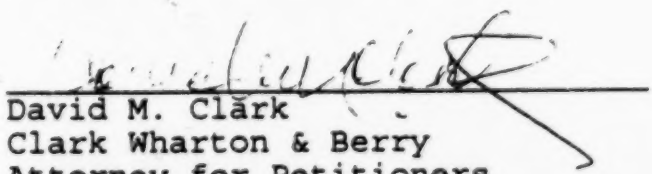
unexpensive. Cf. Middlesex, 675 F.2d at 1203. Compare the Fourth Circuit's "second" bite" theory and its corollary "parade of horribles" (A 10) with practical and more realistic authority holding that action to confirm or vacate an arbitration award is the place for judicial scrutiny of an arbitrator's qualifications. See, e.g., Marc Rich & Co., A.G. v. Transmarine Seawave Corp., 443 F.Supp. 386 (S.D.N.Y. 1978). Also see Commonwealth and Middlesex.

CONCLUSION

In Shearson/Am. Express this Court approved arbitration resolution in securties disputes because self-regulatory organizations (SRO's) such as the NASD are subject to regulation by the SEC, with final oversight by the Courts. Here the Fourth Circuit decision allows an SRO to ignore its own

SEC-mandated rules and condones an arbitration in which the appointment of all three arbitrators was tainted, in one degree or another, by information not disclosed or concealed. This decision by the Fourth Circuit can be understood only by assuming that the Fourth Circuit believes its duty is to leave hands off arbitration matters totally. This Court should grant certiorari to give guidance to the lower courts as to what their duty of oversight is. Surely, it is greater than that afforded by the Fourth Circuit in this case.

Respectfully submitted,



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